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# In the Supreme Court of the United States.

OCTOBER TERM, 1905.

THE UNITED STATES, PETITIONER,

*v.*

G. FALK & BROTHER.

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF THEREON.**

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF THEREON.**

The Solicitor-General, on behalf of petitioner, respectfully prays for a writ of certiorari to review a decree of the United States Circuit Court of Appeals for the Second Circuit adjudging that the weight of imported tobacco at the time of its withdrawal from the Government warehouse for consumption, and not its weight when entry is made with the collector, determines the amount of duties payable thereon.

## BRIEF.

### STATEMENT OF CASE.

G. Falk & Brother in 1902 imported, entered, and warehoused certain tobacco. When withdrawn in 1904, the collector assessed duty according to the weight returned at original entry against Falk's protest that the weight at withdrawal should govern. (R., 8, 9, 10.) The Board of General Appraisers sustained the collector under proviso to section 33, tariff

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act July 24, 1897 (30 Stat., 213), which directs that warehoused merchandise shall pay duties upon weight when entered. (R., 12–15.)

The Circuit Court held the proviso inapplicable because restricted to imported merchandise not entered before the act took effect, but sustained the Board on the ground that section 2983, Revised Statutes, prohibiting abatement of duties for loss by merchandise while warehoused, applied to diminution of weight caused by evaporation. (R., 17–19.)

The Circuit Court of Appeals held section 2983, Revised Statutes, applicable only to "actual reduction in the value or quantity of the merchandise" and inapplicable to loss of weight resulting from evaporation of moisture; and that duty should have been assessed on the weight at withdrawal, under section 20, customs administrative act of 1890 as amended by the proviso to act of 1902, which prescribes that warehoused merchandise may be withdrawn within three years on payment of the same *rate* of duties and charges imposed upon like articles imported at the time of such withdrawal.

### IMPORTANCE OF QUESTION.

Tobacco when imported generally contains much moisture, which evaporates in a warehouse, causing loss in weight from 2 to 10 per cent, according to circumstances.

Duties on leaf tobacco for 1905 amounted to nearly $20,000,000. Most of it was warehoused in this country, and if duty is assessed upon weights at withdrawal,

hereafter all of it may be. Under the decision of the Circuit Court of Appeals on leaf tobacco alone officials of the Treasury Department estimate that the Government will certainly lose in excess of $500,000—possibly more than $1,000,000—annually; duties on other articles, especially wool, sugar, skins, hides, etc., containing much moisture, will materially decrease.

There are now pending before the Board of General Appraisers 8,252 protests on tobacco, 1,598 on wool, and some on sugar, awaiting the result of this case.

From 1890 to 1897 frauds were practiced on the customs by extracting from the warehouse parts of the merchandise and then claiming allowance for loss. One purpose of Congress in 1897 when it changed the rule and required weights to be ascertained upon entry was to prevent such fraud.

Because of the serious loss of revenue which will result if the decision of the Circuit Court of Appeals is acquiesced in and also because of the conflicting views of the tribunals below as to the law a review by this court seems especially important.

## STATUTES.

Before the act of October 1, 1890, tobacco, when withdrawn from a warehouse, paid duty on its weight at entry. This action of executive officers was not questioned. That act (26 Stat., 624) provided:

> SEC. 50. That on and after the day when this act shall go into effect all goods, wares, and merchandise previously imported, for

> which no entry has been made, and all goods, wares, and merchandise previously entered without payment of duty and under bond for warehousing, transportation, or any other purpose, for which no permit of delivery to the importer or his agent has been issued, shall be subjected to no other duty upon the entry or the withdrawal thereof than if the same were imported respectively after that day: *Provided*, That any imported merchandise deposited in bond in any public or private bonded warehouse having been so deposited prior to the first day of October, eighteen hundred and ninety, may be withdrawn for consumption at any time prior to February first, eighteen hundred and ninety-one, upon the payment of duties at the rates in force prior to the passage of this act: *Provided further, That when duties are based upon the weight of merchandise deposited in any public or private bonded warehouse said duties shall be levied and collected upon the weight of such merchandise at the time of its withdrawal.*

May 4, 1891, Attorney-General Miller held the last proviso was not restricted to the subject-matter of the section—merchandise imported before the act took effect—but was of general application. (20 Op. A. G., 81.) This construction was followed until the act of July 24, 1897 (30 Stat., 213), which provided:

> SEC. 33. That on and after the day when this act shall go into effect all goods, wares, and merchandise previously imported, for which no entry has been made, and all goods, wares, and merchandise previously entered

> without payment of duty and under bond for warehousing, transportation, or any other purpose, for which no permit of delivery to the importer or his agent has been issued, shall be subjected to the duties imposed by this act and to no other duty, upon the entry or the withdrawal thereof: *Provided, That when duties are based upon the weight of merchandise deposited in any public or private bonded warehouse, said duties shall be levied and collected upon the weight of such merchandise at the time of its entry.*

The Board of General Appraisers, July 14, 1898 (T. D., 19715), held the proviso to section 33, act 1897, superseded the last proviso to section 50, act 1890, and, like that, was of general application (R., 13–15). Importers acquiesced until this case.

Section 20, customs administrative act, June 10, 1890 (26 Stat., 140) provides:

> Any merchandise deposited in any public or private bonded warehouse may be withdrawn for consumption within three years from the date of original importion, on payment of the duties and charges to which it may be subject by law at the time of such withdrawal: *Provided,* That nothing herein shall affect or impair existing provisions of law in regard to the disposal of perishable or explosive articles.

The act of December 15, 1902 (32 Stat., 753), was passed to amend section 20, customs administrative act of 1890, and provides that such section shall read :

> SEC. 20. That any merchandise deposited in any public or private bonded warehouse may

> be withdrawn for consumption within three years from the date of original importation on payment of the duties and charges to which it may be subject by law at the time of such withdrawal: *Provided, That the same rate of duty shall be collected thereon as may be imposed by law upon like articles of merchandise imported at the time of the withdrawal: And provided further,* That nothing herein shall affect or impair existing provisions of law in regard to the disposal of perishable or explosive articles.

This section originated in section 1, act March 14, 1866 (14 Stat., 8), and was carried into the Revised Statutes as follows:

> SEC. 2970. Any merchandise deposited in bond in any public or private bonded warehouse may be withdrawn for consumption within one year from the date of original importation on payment of the duties and charges to which it may be subject by law at the time of such withdrawal; and after the expiration of one year from the date of original importation, and until the expiration of three years from such date, any merchandise in bond may be withdrawn for consumption on payment of the duties assessed on the original entry and charges, and an additional duty of ten per centum of the amount of such duties and charges.

In *Merritt* v. *Cameron* (137 U. S., 542, 550, 551), this court said section 2970 was "intended to provide for cases in which a change in the rate of duty had been made by statute while the merchandise was in

the bonded warehouse;" that under both of its clauses duties were to be assessed at the rate in force at withdrawal, the only difference being a 10 per cent increase when the merchandise was withdrawn under the second clause.

Section 20, customs administrative act, June 10, 1890 (26 Stat., 131), reenacted the first clause of section 2970, Revised Statutes, omitted the second clause, and added a proviso immaterial here.

Section 54 of the tariff act of October 1, 1890 (26 Stat., 624), reenacted section 20 with an amendment not material here.

The act of December 15, 1902, amended the section by inserting a new proviso as shown above, which was held in *Mosle* v. *Bidwell* (130 Fed., 334) to declare the meaning of the original provisions.

Rev. Stats., sec. 2964.

> In all cases of failure or neglect to pay the duties within the period allowed by law to the importer to make entry thereof, or whenever the owner, importer, or consignee shall make entry for warehousing the same, in writing, in such form and supported by such proof as shall be prescribed by the Secretary of the Treasury, the merchandise shall be taken possession of by the collector, and deposited in the public stores, or in other stores to be agreed on by the collector or chief revenue officer of the port, and the importer, owner, or consignee, such stores to be secured under the joint locks of the inspector and importer, there to be kept with

due and reasonable care, at the charge and risk of the owner, importer, consignee, or agent, and subject at all times to their order, upon payment of the proper duties and expenses, to be ascertained on due entry thereof for warehousing, and to be secured by a bond of the owner, importer, or consignee, with surety to the satisfaction of the collector in double the amount of the duties, and in such form as the Secretary of the Treasury shall prescribe.

Rev. Stats., sec. 2983.

In no case shall there be any abatement of the duties or allowance made for any injury, damage, deterioration, loss, or leakage sustained by any merchandise while deposited in any public or private bonded warehouse.

Rev. Stats., sec. 2984.

The Secretary of the Treasury is hereby authorized, upon production of satisfactory proof to him of the actual (industry) (injury) or destruction in whole or in part of any merchandise, by accidental fire, or other casualty, while the same remained in the custody of the officers of the custom in any public or private warehouse under bond, or in the appraisers' stores undergoing appraisal, in pursuance of law or regulations of the Treasury Department, or while in transportation under bond from the port of entry to any other port in the United States, or while in the custody of the officers of the customs and not in bond, or while within the limits of any port of entry, and before the

same have been landed under the supervision of the officers of the customs, to abate or refund, as the case may be, out of any moneys in the Treasury not otherwise appropriated, the amount of impost duties paid or accruing thereon; and likewise to cancel any warehouse bond or bonds, or enter satisfaction thereon in whole or in part, as the case may be.

## ARGUMENT.

### I.

**The proviso to Section 33, Act of July 24, 1897, is of general application.**

This proviso is identical with the second one to section 50, act October 1, 1890, except the word "entry" is substituted for "withdrawn."

The construction by the Attorney-General giving general application to the proviso in the law of 1890 accepted during the seven years it remained in force, was adopted by Congress in the law of 1897 and has been followed since that time by the customs officers.

The general application uniformly given these provisos for the last sixteen years by Executive Departments should not be overruled except for most cogent and persuasive reasons.

*Robertson* v. *Downing*, 127 U. S., 607.
*United States* v. *Healy*, 160 U. S., 136.

The tariff act of 1897, as it passed the House, provided a duty of $2 per pound upon unstemmed leaf tobacco; the Senate reduced the duty to $1.75.

In conference the rate was fixed at $1.85 and the proviso to section 33 inserted (H. R. bill 379, 55th Cong., 1st sess.).

This proviso though applying to all weighable merchandise was enacted with special reference to tobacco, which is chiefly affected by it. The intention of Congress to have the proviso apply to merchandise thereafter imported, and not confined merely to goods already imported, is clear.

In 1900 a bill providing for payment of duties on tobacco according to weight at withdrawal from the warehouse was considered by the House Committee on Ways and Means. The president of the Cigar Leaf Tobacco Board of Trade of the United States, urging passage of the bill, said (hearings before Committee on Ways and Means, Fifty-sixth Congress, first session, March 7, 1900):

> * * * The necessity for its introduction is to correct an injustice done the tobacco and cigar industry of the United States by the substitution of one word for another in the act of July 24, 1897 * * *.
>
> Previous to the passage of this act duties had been levied in accordance with section 50 of the act of October 1, 1890 * * *.
>
> You will note that the only difference in the wording of the two sections is in the substitution of the word "entry" in the act of 1897 for the word "withdrawn," which was in the act of 1890, and this substitution of one word for another has seriously affected the tobacco and cigar, warehouse, and insurance interests of the country. * * *

> The CHAIRMAN (Mr. Payne). I remember very distinctly when this change was made in the conference committee it was represented by the United States officials that the duty had been provocative of very great frauds on the revenue; that tobacco not only shrank in weighing in drying out, but it shrank from some other reasons, and it was charged that tobacco, sugar, and some other commodities disappeared from the bonded warehouse, and when they came to weigh out there was a great shrinkage. That was the charge made by the United States officials and the reason the change was made back to the old law prior to 1890.

To give this proviso general application conforms to the principles of statutory construction.

In *United States* v. *Whitridge* (197 U. S., 135, 143), this court said:

> While, no doubt, the grammatical and logical scope of a proviso is confined to the subject-matter of the principal clause, we can not forget that in practice no such limit is observed, and when, as here, we are dealing with an addition made in new circumstances to a form of words adopted many years before, the general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down.

In *United States* v. *Downing* the Circuit Court of Appeals for the Second Circuit (January 10, 1906) held a proviso to paragraph 626 of the tariff act of 1897 providing for a countervailing duty upon crude

petroleum and its products was general in its application, and included products of crude petroleum other than those mentioned in the preceding part of the paragraph, and said:

> It is, no doubt, the general rule that a proviso to a particular section does not apply to other sections, and that it is to be construed with reference to the immediately preceding parts of the clause to which it is attached. But such a rule is not controlling, especially in such composite structures as tariff and appropriation acts.

A separate section (5) of the Philippine tariff act of March 8, 1902 (32 Stat., 54), provides that when duties upon merchandise imported from the Philippines "are based upon the weight of merchandise deposited in any public or private bonded warehouses, said duties shall be levied and collected upon the weight of such merchandise at the time of its entry." This amounts to a legislative construction of the proviso to section 33, act of 1897. Congress did not intend to prescribe a different rule on that subject as to imports from the Philippines and those from foreign countries.

## II.

**Section 20, Act June 10, 1890, as amended in 1902, relates to the rate of duty, and not the time when the weight shall be ascertained.**

The purpose of this section was to prescribe a rule applicable to warehoused goods in case of change

of tariff rates, as for example if the President should suspend the ordinary rate under section 3, or a reciprocity treaty should be negotiated under section 4, act 1897, or a special act should be passed.

Construing section 2970, Revised Statutes, from which section 20 was taken, Mr. Justice Lamar for the court said in *Merritt* v. *Cameron* (137 U. S., 542, 550, 551):

> *In our opinion that section was intended to provide for a case in which a change in the rate of duty had been made by statute while the merchandise was in the bonded warehouse.* (*Fabbri* v. *Murphy*, 95 U. S., 191; act of March 14, 1866, 14 Stat., 8, c. 17.) The first clause of the section means simply that if there had been a *change in the rate of duty* after the merchandise has been entered in bond, and the withdrawal of the merchandise takes place afterwards and within one year from the date of the importation, the duties to be paid are such as are fixed by the law in force at the date of the withdrawal. The second clause of section 2970 provides that if the merchandise remain in the bonded warehouse more than one year it may be withdrawn for consumption at any time within three years upon the payment of the duties and charges assessed upon the original entry and 10 per centum in addition. The phrase "duties assessed on the original entry," etc., evidently means the duties on the original entry as finally ascertained and liquidated within the meaning of those terms, as used in section 2931. In either case, if the statute *changing* the rate of duties goes into effect after

> the liquidation of the original entry, a reliquidation must necessarily take place. *The two clauses of the section differ in one respect only, viz, in a 10 per cent increase of duties*, where the merchandise remains in the warehouse more than one year, and is withdrawn within three years from the date of importation. This construction renders the two sections of the statute harmonious.

*Merritt* v. *Cameron* was followed in *Saltonstall* v. *Russell* (152 U. S., 628, 633).

In the present case the Circuit Court of Appeals took a different view of these two clauses, saying that "in section 2970 the distinction is sharply drawn between duties * * * to which it may be subject by law at the time of withdrawal and duties assessed on the original entry."

Referring to *Mosle* v. *Bidwell, supra*, it said:

> We think this decision is conclusive upon the question herein. If other like goods had been imported at the time when these goods were withdrawn, duty would have been assessed thereon according to its weight at that time.

In that case the Circuit Court of Appeals held that under section 20 of the act of December 15, 1902, cigars imported from Porto Rico and warehoused prior to the ratification of the treaty of peace with Spain and withdrawn after the ratification but before the passage of the Foraker Act, were entitled, like other goods imported at the time of withdrawal, to be free from duty. Clearly that case involved an entirely different question, and is inapplicable to the question

raised here. The *amount* of duty is one thing—the *rate* another. Like tobacco imported at the time of withdrawal of this, paid the same rate.

In *Hartranft* v. *Oliver* (125 U. S., 525), and other cases relied upon by the importer, there had been a change in the rate of duty before the goods passed out of Government control.

## III.

**If the proviso to Section 33, Act 1897, is inapplicable, nevertheless the tobacco was dutiable upon its weight at withdrawal.**

Duties accrue when imports arrive at port of entry. The debt is then due, although a statute may make it payable afterwards. (*Saltonstall* v. *Russell, supra.*)

> Duties are required by law to be assessed on the goods, and the assessment is uniformly made on the quantity entered at the custom-house, without any allowance whatever for the ordinary leakage and deterioration. (*Belcher* v. *Linn*, 24 How., 508, 525; *American Sugar Refining Co.* v. *United States*, 181 U. S., 610.)

In *Merritt* v. *Cameron* (137 U. S., 542, 549, 550), Mr. Justice Lamar, for the court, said:

> We find nothing in the statutes or in any of the decisions of this court warranting the construction contended for by the defendants in error, that the ascertainment and liquidation of the duties referred to in section 2931 should be made at the date of the final withdrawal of the merchandise from the bonded warehouse. On the contrary, we think the ascer-

tainment and liquidation of the duties on merchandise entered in bond for warehouse should follow, in the regular course of business, as soon after the entry as is convenient, just as in the case of merchandise entered for immediate consumption. The statutory regulations as to the ascertainment and liquidation of duties are the same in the one instance as in the other. The measurement, weighing, or gauging of the merchandise, the inspection and appraisal of it, and the determination of its dutiable value are required to be proceeded with exactly the same in each instance. After the ascertainment of those facts in relation to the entry the collector has to decide what the duties are in each case. His decision at that time is the ascertainment and liquidation of the duties referred to in section 2931; and there would seem to be no good reason for his delaying that decision in the case of merchandise entered in bond for warehouse until the convenience of the importer shall suggest the removal of the merchandise from the warehouse.

Section 2890, Revised Statutes, provides that where duties are based upon weight or measure the weighers shall within three days after discharge of a vessel make return upon the articles weighed or measured by them.

Section 2882, Revised Statutes, prohibits removal of merchandise without permission before it has been weighed or measured.

Section 2964, Revised Statutes, expressly provides that duties on warehoused merchandise shall "be ascertained on due entry thereof for warehousing."

These decisions and statutes clearly show Congress intended to require merchandise to be weighed and measured immediately upon arrival, and duties assessed according to its condition at that time. There is no provision of law for reweighing or remeasuring.

Sections 2983 and 2984, Revised Statutes, show that no allowance or abatement of duty can be made in any case, where goods are warehoused, except for accidental fire or other casualty.

It is said the word "loss" in section 2983 does not include loss occasioned by the evaporation of moisture from tobacco. But construing sections 2983 and 2984 together it is plain that 2983 refers to every loss except that occasioned by accidental fire or other casualty.

Loss of liquor by evaporation is within section 2983. (Treas. Dec., 15400.)

Change of condition from that of uncleaned rice to a by-product is a deterioration within the meaning of section 2983. (21 Op. A. G., 474.)

In this case a certain lot of tobacco went into warehouse which weighed less when it came out. What became of the difference? It was lost, or it leaked, or it was damaged, injured, or deteriorated. It certainly disappeared. And if it disappeared, no matter by what means, it must be lost. No amount

of explanation as to how or why it disappeared could take such disappearance out of the meaning of one of the five words embraced in section 2983.

In *Seeberger* v. *Wright & Lawther Co.* (157 U.S., 183), it was held that an allowance should be made at the time of entry for impurities which are no part of the merchandise and the amount of which can be readily ascertained. The merchandise referred to in that case was uncleaned flaxseed, containing clay, sand, and gravel.

On the other hand, it was held in *Earnshaw* v. *Cadwalader* (145 U. S., 247) that iron ore, containing in its commercial state a certain amount of moisture, was taxable upon its weight with the moisture included.

The present case is more analogous to *Earnshaw* v. *Cadwalader* than to the *Seeberger* case. Leaf tobacco when imported contains moisture. That must be regarded as its commercial state, and it is upon such tobacco, moisture included, that duty must be paid when entered for consumption.

Here no allowance was claimed at entry. If the tobacco contained an unusual amount of moisture, claim should have been made then. Article 1276 of the Customs Regulations of 1899 provides for an allowance "whenever the weight of imported merchandise has apparently increased by the unusual absorption of sea water, or of moisture, while on the voyage of importation," if application is made within ten working days after landing the goods.

No allowance is made for ordinary moisture, nor for evaporation or shrinkage upon the voyage of importation (see *Robertson* v. *Bradbury*, 132 U. S., 500), except by express provision of law. Paragraph 393 of the tariff of 1897 provides that the duty upon wood pulp shall be upon its *dry* weight.

When Congress fixed the rate of duty it necessarily took into consideration that imported tobacco contains a certain amount of moisture and adjusted the duty with that fact in view.

Whether the proviso to section 33, act of 1897, is applicable or not, it is clear that the tobacco in question was dutiable upon its weight at entry, there being no statute authorizing reliquidation because of change in weight while goods are warehoused.

HENRY M. HOYT,
*Solicitor-General.*

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